

No. 4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Appellants,

v.

S. B. STREET, ET AL., *Appellees.*

On Appeal From the Supreme Court of Georgia

**APPELLANTS' RESPONSE TO BRIEF OF
THE UNITED STATES**

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II. This case does not involve "delicate constitutional issues" concerning a "broad spectrum of union activities"

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ARGUMENT

The brief of the United States takes the position that regardless of what expenditures appellant may make, the courts below were in error in holding section 2, Eleventh of the Railway Labor Act unconstitutional, in holding the union-shop agreements between appellant unions and the railroad appellees valid, and in enjoining the enforcement of the shop agreements, and that the decision below

therefore be reversed. With such a Government we are of course in accord. The Government's brief suggests also that this should not determine whether the expenditures involved violate constitutional rights of the appellees, because such expenditures are "outside the spectrum" of union activities some of which involve "delicate constitutional issues", and that there are possible remedies if the expenditures are excessive. With such suggestions we disagree.

I. Congress Contemplated That the Unions Would Make Expenditures and at Least Three Times as Much as They Restrict Them or to Give Dissident Unions a Right to Sue Against Them

As we pointed out in our main brief, the enactment of section 2, Eleventh Amendment, by the Congress, opposition to which was expressed both in hearings and on the floor of Congress on the ground that unions make expenditures of the nature here involved.¹ Congress contemplated such restrictions and enacted the bill.

Prior thereto, as we pointed out in our main brief (pp. 29-30), in considering the legislation which became the Labor-Management Relations Act, 49 U.S.C., secs. 141 et seq.), there was a full discussion, at hearings and on the floor of Congress,

¹ Hearings on S. 3295, 81st Cong., 2d Sess., Labor and Pub. Welfare, pp. 173-4, 316-7; 96

² Hearings, Sen. Comm. on Labor and Pub. 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arguments of the record. But the Gov- this Court need not the expenditures in- s of the individual res cover a "broad me of" which raise and indicates other tures are unlawful.

ions Would Make Such Times Has Refused to at Members Protection

rief (pp. 27-9), while th was under consid- on to its enactment d on the floor of Con- make expenditures of ss refused to impose

it in our main brief gislation that became s Act of 1947 (29 as very considerable e floor of Congress,²

Sess., Sen. Subcomm. on ; 96 Cong. Rec. 17049-50.

Pub. Welf, on S. 55, 80th 1452, 1455-6, 1687, 2065, n. on Ed. and Labor on ss., pp. 64, 350, 1140-87, 31, 3806; 93 Cong. Rec. 8, 6440, 6523, 7488, 7492.

of expenditures of the nature here involve (in some instances these very appellant these very expenditures) that had or n union-shop agreements, and argument on to use union-shop agreements to obtain fur purposes, and yet the only restriction enac amendment to the Federal Corrupt Practi U.S.C., sec. 610). Some of this legislativ reviewed in *United States v. C.I.O.*, 335 U. 20, where the Court pointed out that sin had been made in the course of enactin Labor Disputes Act of 1943 to have Co minority members rights against the exp union funds to espouse political causes opp minority. Hearings on H.R. 804 and H.R. comm. of the Comm. on Labor and Ed., 78t sess., 117-8, 133; 89 Cong. Rec. 5334, 579; Rec. 6440.

In 1958, shortly after the decision of th Court of North Carolina in *Allen v. So. A* N.C. 491, 107 S.E. 2d 125, a case involving parties, these same issues, but reaching a opposite that of the Supreme Court of C amendment (prompted by the *Allen* decisio ing legislation was proposed that would dissident members of a union under a agreement the right to have their dues us collective bargaining and related purpos amendment was defeated.³ Again there wa able discussion on the floor of Congress.⁴ S of our main brief.

³ 104 Cong. Rec. 11330, 11347.

⁴ 104 Cong. Rec. 11274-5, 11338-9, 11343-4.

Once again, in enacting the Labor-Management Reporting and Disclosure Act of 1959 Congress had before it this question, and again restrictions on expenditures of the nature here involved were not imposed. See pp. 48-49 of the Brief of the United States.

It is thus abundantly plain that Congress has repeatedly had before it the question of restricting expenditures of funds by unions having union-shop agreements, the very types of expenditures here involved, and has refused to enact such restrictions. Plainly it was known to Congress that these unions engage in these activities and Congress has refused to restrict them while permitting a union ship. There can be no escape from the conclusion that when Congress adopted the policy of permitting railroad unions to negotiate union-shop agreements, that policy was to permit such agreements by unions functioning as they had been functioning for many years and that the permission was not conditioned upon the unions adopting radical and impractical revisions in the way they operate.

II. This Case Does Not Involve "Delicate Constitutional Issues" Concerning a "Broad Spectrum" of Union Activities

If the issue of the legality of the questioned union expenditures were here in a different posture,—if this case involved the validity of Congressional restrictions on expenditures of the nature here involved,—then in truth there would be involved "delicate constitutional issues" concerning a "broad spectrum" of union activities. *United States v. C.I.O.*, 335 U.S. 106, 120. Congress has imposed restrictions on what unions may do, and perhaps it may impose others. *United States v. U.A.W.-C.I.O.*, 352 U.S. 567, 598 (footnote). Such

statutorily imposed inhibitions on the freedom of those associated in a union would thus raise issues which this Court, in accord with its repeatedly stated principles, would avoid adjudicating unless absolutely necessary, out of "a just respect for the legislature", a coordinate branch of the government. *Ex parte Randolph*, 20 Fed. Cas. No. 11,558 at p. 254, quoted in *United States v. C.I.O.*, 335 U.S. 106, 125-6 (concurring opinion).

But the nature or variety of the union activities to which a dissident union member may be opposed is not relevant to the constitutionality of his being subject to a union shop and being required to pay dues, once it be held that his employment can constitutionally be conditioned on his paying dues part of which is spent for any purpose he opposes. See our main brief pp. 48-52. As we there explained, the nature of the ideas or activities opposed by the dissident member has no bearing on the legality of the expenditure, assuming of course that the expenditure is otherwise lawful as not in contravention of statute and not ultra vires.

There is no contention here that the expenditures involved are ultra vires or unlawful for any reason other than that they support causes opposed by the individual appellees. In the trial court, for example, the plaintiffs expressly disavowed any contention that the political expenditures here involved were violative of the Corrupt Practices Act. R. 232. If the expenditures were claimed to be ultra vires or otherwise unlawful a remedy would be afforded by section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C., sec. 501.

The contention of the individual appellees is not that there is anything innately wrong or unlawful in the activities of the unions in question but that they are wrong, and unconstitutional, only because they are financed in part with resources to which the disagreeing minority contributed. If the Court agrees, as we do, with the views of the United States that section 2, Eleventh of the Railway Labor Act is constitutional and that the union-shop agreements are lawful agreements, we have here simply a dispute whether certain expenditures by a union violate the constitutional rights of certain people. There are thus absent the considerations on which are bottomed the doctrine pursuant to which this Court has sometimes gone to rather extreme lengths to avoid deciding constitutional issues, which we have seen is a just respect to or a due regard for a coordinate branch of the Government. In passing on the constitutionality of the expenditures the Court would not be risking undoing any work of Congress or the executive branch of the Government. It is only the unions and their dissidents who might feel aggrieved by the decision, and neither of them is a coordinate branch of the Government.

Nor may it be said that a skimpy record was developed in the courts below. The record filed here must be one of the exceptionally large ones.⁵ Very clearly, the plaintiffs in the trial court put into the record everything they thought would be of the remotest help to them on any issue. Further proceedings in this case are hardly likely to cast any additional light on any of the issues, and in view of the material set forth on

⁵ We were advised by the clerk of the court below that the record in this case is by far the largest ever filed in that court,—more than twice as large as the next largest.

pages 87-99 and 102-9 of our main brief, and in light of the opinion of the court below on the first appeal to that Court in this case (*Looper v. G. S. & F. Ry. Co.*, 213 Ga. 279, 99 S.E. 2d 101; App. A to Jurisdictional Statement), the value of such further proceedings is, to say the least, difficult to perceive for other reasons.

III. The Expenditures Are Clearly Lawful

As we have seen above, it is not even contended that the expenditures involved are unlawful for any reason other than the fact that the unions making them have a union shop. Such expenditures, by unions not having a union shop, are not challenged. Nor does the Government suggest any invalidity of the expenditures; it simply says that if they are invalid the plaintiffs below misconceived their remedy and that regardless of their validity or invalidity section 2, Eleventh is constitutional and the union-shop agreements valid.

We find it difficult to understand an argument that expenditures by a union, otherwise lawful, might infringe First Amendment rights because the union has a union shop. Nothing that the union publishes or espouses or otherwise supports prevents any dissident member from doing anything, while, on the other hand, restricting the majority in engaging in such activities might well infringe their First Amendment rights. See *United States v. C.I.O.*, 335 U.S. 106, 120-2, 139. The individual dissident is as free as before to read what he wants, to think what he wants, to listen to what he wants, to say what he wants, etc.; the only requirement of the union shop is that he contribute to the funds of the union which get spent as a majority wishes within such limitations as Congress sees fit to and may constitutionally impose. If any other condition on con-

tinued employment is imposed, then under the union shop agreement itself, as well as under section 2, Eighth, the individual would not have to comply with union shop.

Indeed the problem, if there is one, is not a problem raised by a union shop. It is now settled that employees of a railroad employer and certain other employers must accept collective bargaining by a representative chosen by the majority. Even in the absence of a union shop, the motivation for belonging to a union to have a direct voice in determining its policies concerning the wages and working conditions of those it represents may be as compelling as a union shop. If a union shop raises First Amendment issues, why not those who belong because they desire direct participation in the affairs of their collective bargaining representative that fixes by agreement their wages and working conditions any less protected than those who decide to work for a railroad that has a union-shop agreement? Plainly these questions are not engendered by a union shop. The extensive discussion in *United States v. C.I.O.*, 335 U.S. 106 and in *United States v. U.A.W. C.I.O.*, 352 U.S. 567 was based on considerations not related to a union shop and assumed that the policy should be one determined by Congress within the constitutional limitations protecting the majority.

The Government's brief suggests the possibility of "contracting out" of a portion of the dues because of political activities, as is provided by statute in Great Britain. Brief, pp. 29-30, 45-6. But any such remedy for dissidents is obviously a legislative matter within the discretion of Congress; it is simply impossible to find any such affirmative requirements in the Constitution. Some of the Justices of this Court have re-

nized the possible desirability of such or similar legislation, but never has it heretofore been suggested as a constitutional requirement. *United States v. U.A.W. C.I.O.*, 352 U.S. 567, 597-8; *United States v. C.I.O.*, 335 U.S. 106, 149-50.

In the last two cases cited the opinions also adverted to the British legislation, and we deem it advisable to clear up what may be some misconceptions about that system of "contracting out" of political contributions.

The amount of the "political levy" concerning which a trade unionist in Great Britain may "contract out", that is, not pay upon filing a form declaring he does not want to pay, is the amount that the union credits to its "political fund". This amount has grown in recent years so that it has now reached perhaps a shilling per year in most unions and ranges up to two shillings per year per member. The union disburses this money in its political fund for two types of purposes; first, to pay the affiliation fee of the Labour Party for its members, and second, to make contributions to candidates for political office to help meet their campaign expenses⁶ or to subsidize them as members of Parliament.⁷ But only these disbursements are limited to the "political fund"; all other activities in the political

⁶ In Great Britain only the candidate and his election agent may make direct campaign expenditures, and the permissible amounts of such expenditures are strictly limited. "Parliamentary Elections in Britain", British Information Services, I.D. 1314, September 1958.

⁷ Martin Harrison, "Trade Unions and the Labour Party Since 1945", George Allen and Unwin Ltd., London, 1960, pp. 61, 65. (Also available in an edition printed in Great Britain, bound in the United States, Wayne State University Press, Detroit, 1960.)

or legislative realm are financed from the union's general funds, "no matter how controversial."⁸

Many of the union activities complained of here are carried on by British unions through their general funds, not their political funds. British unions, like ours, have union publications in the form of periodicals and pamphlets; they make the payment of the "political levy", espouse the cause of political candidates, support the policies of the Labour Party, and the like.⁹ British unions do not support the Labour Party other than by affiliation agreements, but it is accepted that they should do so.¹⁰ Some of them spend substantially more than their political funds come on political matters, and the propriety of these activities is apparently not questioned.¹¹

With respect to legislative activities the situation is somewhat different from that here both because of the difference in the legislative procedure and because trade union members of Parliament speak for all unions in Parliament.¹² It is sufficient to point out that British unions, through expenditures from their general funds, and British unions that have no political funds, devote considerable energies (and necessarily considerable expenditures) to so-called non-bargaining matters including representations to Parliament and to the various branches of the government and the exposition of

⁸ Harrison, *op. cit.*, pp. 56-7.

⁹ Harrison, *op. cit.*, pp. 46-8, 57-8, 125-6.

¹⁰ Harrison, *op. cit.*, pp. 65-6.

¹¹ Harrison, *op. cit.*, p. 90.

¹² Harrison, *op. cit.*, pp. 292, 299, 332.

policies and views on legislation.¹³ It is the conclusion of a recent British study that a union "cannot fully represent its members without mixing in politics,"¹⁴ and that "political or revolutionary strikes apart, trade union political action could be little more than an oratorical gesture without the backing of substantial finance."¹⁵

The recent study of political activity by British unions reached a conclusion remarkably similar, even in language, to the argument on pages 53-62 of our main brief, especially on pages 61-2. With respect to the contention that politics should be left to the politicians and unions should confine themselves to seeking higher wages and better conditions, the statement is made:¹⁶

"Such judgments spring either from woolly thinking; or from a complete misapprehension of trade unionism. The unions have never been wholly isolated from politics, even in the days of purest *laissez faire*. In 1867 the Trades Union Congress found itself involved at birth with the Royal Commission on the Trade Unions. By the end of the century the unions were pressing for the State to introduce regulation of sweated labour; improved safety regulations, even nationalization. Such essentially industrial aims could not be achieved without the intervention of the State.

"Today there is less possibility than ever of a union avoiding involvement in politics. Even if we accept that the mission of trade unionism is just to 'win higher wages and better conditions'

¹³ Harrison, op. cit., pp. 125-6, 328, 331.

¹⁴ Harrison, op. cit., pp. 331-2; cf. our main brief, pp. 53-62.

¹⁵ Harrison, op. cit., p. 55.

¹⁶ Harrison, op. cit., pp. 13-14.

the idea that these can be won without into 'politics' bears no relation to reality. Activities of government have multiplied to a point where Ministers influence wage settlements in nationalized industries, and mediate disputes in private industry, 'politics and conditions' have become inextricably linked. Far from keeping the unions at a distance, governments continually seek their opinion on a wide range of questions. Union representatives are a familiar figure on innumerable committees in government and on every Royal Commission. Today it is unthinkable that this movement, which was hailed by Sir Winston Churchill as an essential part of the political realm, should become 'non-political' in the sense in which some of its critics use the term.

"But the unions are more than simple pawns, caught up in the political battle. They are combatants. Most of them are in direct partnership with the Labour Party; the decision taken in 1899 has led them a long way. 'Political unionism' has meant not only electing working class members to Parliament and 'winning better conditions' but also making pronouncements on education and foreign policy and helping to shape Labour's policy on disarmament and a host of other issues which have only a tenuous connection at best with the unionists' material interests."

It seems fair to conclude that the net effect of the British system in substance is simply to permit a union member to "contract out" of contributing to the fund spent for purposes for which the Corrupt Practices Act prohibits the expenditure of *any* union funds, as federal elections are concerned. But whether one agrees or disagrees with the wisdom or sufficiency of the British solution, we submit such solution, with its limited restrictions of the Corrupt Practices

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or any other accommodation of these conflicting
 ests, or no solution, is a matter for legislative
 mination and not a constitutional command. The
 expenditures here involved are otherwise lawful
 the fact that the unions have a union shop do
 render them unconstitutional as infringements of
 Amendment rights of anyone. Accordingly, the
 decision below should be reversed and the case rem
 with instructions to dismiss the complaint.

CONCLUSION

It is difficult to understand the Government's
 of concern with the implications of its suggestion
 "delicate constitutional issues" are involved. In
 statement that "money talks" may result in a
 conclusion that the expenditure of money from a
 to which an individual has contributed deprives
 individual of First Amendment rights if the ex
 iture promotes causes opposed by the individual,
 as we pointed out in our reply brief (p. 9) the
 issues would be raised by the Government's exp
 ture of funds contributed to by atheists and isol
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 America. Examples could be multiplied. Surely
 the limitations of the First Amendment are at
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 and are at least as applicable to funds raised b
 coercive power of taxation as they are to funds r
 by whatever inducements there may be to union
 bership.

The Government's failure to discuss such im
 tions of its suggestion was not due to ignoran
 their existence nor to lack of time. We pointed
 out in our reply brief. It was last June when

Court called the attention of the Attorney the right of the United States to interparticipate in this case as a party. 28. Instead of filing a brief within the time Rule 41(1), the following September the filed a motion for leave to intervene, which promptly granted. The due date of the became November 9, the day after election Department apparently found this time and shortly before its expiration applied for extension of time to November 25, stating that its brief consultations with certain high officials of Government were required. Seemingly the the preceding June had been inadequate for purpose. The application for extension was denied, but a renewed application for an extension to November 19 was granted.

Plainly the Government has had and ample time for consultation and deliberation. It shows no concern over or even interest in the constitutional issues mentioned above of its suggestion that "such constitutional issues" may be involved. This lack of concern results either from conviction that such issues are genuinely and from its conviction that their resolution is on the side of the validity of the expenditure.

As we stated at the outset, we are in accord with the Government's views that section 2, of the National Labor Relations Act is unconstitutional, that the union-shop agreements are valid agreements, and that the enforcement of these agreements should not be enjoined and was not enjoined. We submit that the expenditures do not infringe any First Amendment right.

that the decision below should be reversed, and
remanded with instructions to dismiss the

Respectfully submitted,

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December 15, 1960

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